

## **Culture and the Immigrant Experience: Navigating Family Courts**

by

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This article explores the impact of the immigrant experience in America and the challenges faced not only by immigrants in their new land but also their imported memories and experiences, including dominance and oppression in their national culture. These trauma-based experiences, including domestic abuse, are depicted through the perspectives of two Massachusetts' family law practitioners and a family court judge, alongside an immigrants' rights advocate and former judge from Albania. The authors describe complications experienced by the immigrant community (culturally and personally in transition), including the intersection of those experiences with their legal status including fear of deportation as political winds shift. For practitioners and judges, a deeper understanding of those experiences, often is drawn from the denial of due process and legal protections de-

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nied to them in their countries of origin but available, in many respects, in American jurisprudence.<sup>1</sup>

## I. Introduction

Immigration has been a visceral issue for many generations, fiercely debated by all levels of American society.<sup>2</sup> Yet the impact of trauma experienced by the immigrant community is left largely unexplored in the family courts where evidentiary and statutory rules of law, mixed with issues of federal and state conflicts of law, often constrains its introduction.<sup>3</sup> While upholding that rule of law, family court investigators, counsel for parties,

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<sup>1</sup> The authors are aware of the distinctions between immigration, political asylum, and refugee rights and remedies under American law. The term immigration in this paper is intended to describe that status and experience but with an understanding for the reader that there may be specific legal variations and consequences beyond the scope of this article. For a prior examination of the intersection between immigration and divorce laws in this Journal, see Susan A. Roche, *Maneuvering Immigration Pitfalls in Family Court: What Family Law Attorneys Should Know in Cases with Noncitizen Parties*, 26 J. AM. ACAD. MATRIM. LAW. 79 (2013).

<sup>2</sup> For an historical summary, see Walter A. Ewing, *Opportunity and Exclusion: A Brief History of US Immigration Policy*, IMMIGRATION POLICY CENTER 1,1 (2012), available at [https://americanimmigrationcouncil.org/sites/default/files/research/opportunity\\_exclusion\\_011312.pdf](https://americanimmigrationcouncil.org/sites/default/files/research/opportunity_exclusion_011312.pdf) (“The United States and the colonial society that preceded it were created by successive waves of immigration from all corners of the globe. But public and political attitudes towards immigrants have always been ambivalent and contradictory, and sometimes hostile.”).

<sup>3</sup> The scope of this article does not include the research and clinical definitions of trauma as explored in interdisciplinary literature. The legal literature has described the application of “trauma-informed practice” in legal education and practice which, “has gained traction in the therapeutic world for at least the last decade. As one practitioner has explained, “[t]rauma-informed practice incorporates assessment of trauma and trauma symptoms into all routine practice; it also ensures that clients have access to trauma-focused interventions, that is, interventions that treat the consequences of traumatic stress. A trauma-informed perspective asks clients not ‘What is wrong with you?’ but instead, ‘What happened to you?’” Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L. REV. 359, 363 (2015). As these authors write, “trauma-informed practice can be particularly salient for attorneys because traditionally attorneys are trained to separate emotions from the law in order to competently analyze legal problems. By borrowing trauma-informed techniques developed in the therapeutic context, attorneys are learning to provide more effective representation.” *Id.* at 371.

and judges making important life altering decisions need to be better informed about that experience and its relevant cultural backdrop.<sup>4</sup> The immigrant experience is unique and can often present simultaneous, multiple challenges: from arriving, comprehending, assimilating into or hiding from the American community, to adhering to the fabric and customs of other fellow immigrants. This experience can be especially daunting for women and girls who have fears based not only on their cultural experiences (of deeply ingrained gender inequality), but also the risks and hardships of their journeys to the United States.<sup>5</sup>

Immigrant women often import to America memories of assault, dominance, and oppression. Living in an immigrant community surrounded by fellow and sister immigrants may comfort yet concurrently exacerbate insecurities and vulnerabilities in immigrant women. Additionally, women who are undocumented have fears regarding their legal status, since they may be subject to deportation at any moment as the political climate changes; and those fears may extend to children left behind or suddenly

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<sup>4</sup> See Alan J. Dettlaff, *Immigrant Children and Families and the Public Child Welfare System: Considerations for Legal Systems*, 63 JUV. & FAM. CT. J. 19, 26 (2012) (“When children enter substitute care, family and/or juvenile court judges and attorneys have considerable influence and authority concerning the outcomes of these cases. Child welfare professionals make recommendations to the court, which must be approved by the presiding judge. Legal professionals also have considerable involvement and oversight in developing service plans that specify the steps necessary for reunification or for an alternative form of permanency. Thus, the legal system has considerable responsibility for helping to ensure positive outcomes for children in immigrant families who become involved with this system.”); David B. Thronson, *Creating Crisis: Immigration Raids and the Destabilization of Immigrant Families*, 43 WAKE FOREST L. REV. 391, 392 (2008) (“In fact, the current immigration law enforcement strategy of raiding homes and workplaces relies on the worry and trauma that raids create among parents and children to maximize its impact.”).

<sup>5</sup> See Edna Erez, et al., *Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women*, 4 FEMINIST CRIMINOLOGY 32, 36 (2009) (“Violence against women is one of the most common victimizations experienced by immigrants. Working together, battered immigrant women, activists, and scholars have documented how immigration intensifies domestic violence and creates vulnerabilities that impair immigrant women’s management of domestic violence, preventing them from successfully challenging men’s violence, from securing decreases in rates or types of men’s violence, or from leaving their intimate partners.”).

taken from their care.<sup>6</sup> Women with uncertain immigration status may also lack knowledge of how to safely and effectively access and utilize legal representation to address these challenges.

Family courts have judges and lawyers and professionals who feel compassion for immigrants, but that compassion may be secondary to a body of law developed through legislative and court processes over time and which requires legal adherence to procedure and policies often outside the control of legal actors in that system. This raises a fundamental question: to what extent, if any, should family courts explore the impact of immigrant culture and trauma imported into or experienced within the United States, by cultural norms of the country of origin or suffered here in America by the new settlers? The first part of this article considers informed thinking concerning legal protections and realities in cases involving immigrants and family courts as influenced by the rule of law. It then suggests the need for more flexibility when making decisions where immigration, culture, and trauma such as gender-based violence are present. Finally, and fundamentally, the complexity of “culture,” so broadly different in meaning to so many who experience immigration, is explored in the context of the rule of law by actors in the legal system.<sup>7</sup>

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<sup>6</sup> See Rachael D. Goodman, et al., *Trauma and Resilience Among Refugee and Undocumented Immigrant Women*, 95 J. COUNSELING & DEVELOPMENT 309, 309 (2017) (“Trauma exposures for refugees may be linked to persecution and violence that cause them to flee their home countries, whereas undocumented immigrants may encounter assault and life-threatening conditions during the migration journey. Once settled in the United States, immigrant women often endure myriad stressors (e.g., anti-immigrant environment, family separation) that can exacerbate previous trauma, often without much support.”); Julie M. Linton, Marsha Griffin, & Alan J. Shapiro, *Detention of Immigrant Children*, 139 PEDIATRICS E20170483, at 6 (2017) (“Studies of detained immigrants, primarily from abroad, have found negative physical and emotional symptoms among detained children, and posttraumatic symptoms do not always disappear at the time of release. Young detainees may experience developmental delay and poor psychological adjustment, potentially affecting functioning in school.”).

<sup>7</sup> See Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367, 368 (2002) (“Nonetheless, IPV research with immigrants provides much critical insight into how immigrant women’s cultures, contexts, and legal status can (a) increase vulnerability to abuse, (b) be used by batterers to control and abuse immigrant women, and (c) create barriers to women seeking and receiving help.”); Edna A. Viruell-Fuentes, Pa-

## II. Legal Protections and Demographic Realities

Although the United States has historically struggled with the application of constitutional and legal rights as applying equally to anyone living in the United States, most modern scholars, policy makers, and federal and state courts have required that all people, regardless of immigration or citizenship status, are guaranteed certain basic protections under both civil and criminal law.<sup>8</sup> Nevertheless, immigrant communities are often unaware of the protections afforded to them by the American legal system, including their respective right to separation and/or divorce, right to financial support for themselves or their children, right to marital assets, the custody of their children, or permissible applications to obtain legal immigration status under certain circumstances.

For example, any victim of a crime, regardless of immigration or citizenship status, has the right to contact law enforcement for assistance or access to the courts to obtain a protection order.<sup>9</sup> Despite these guarantees, immigrants, especially undocu-

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tricia Y. Miranda, & Sawsan Abdulrahim, *More than Culture: Structural Racism, Intersectionality Theory, and Immigrant Health*, 75 SOC. SCI. & MED. 2099, 2099 (2012) (“Beyond selectivity and methodological explanations for immigrant health patterns in the United States, scholars often invoke culture to explain these patterns. We contend that cultural explanations mask the effects of social inequalities on immigrant health outcomes, and argue for a shift from individual culture-based frameworks to perspectives that consider the role of structural factors in producing health inequalities among immigrants.”).

<sup>8</sup> See David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 370 (2002) (“The Constitution does distinguish in some respects between the rights of citizens and noncitizens: the right not to be discriminatorily denied the vote and the right to run for federal elective office are expressly restricted to citizens. All other rights, however, are written without such a limitation.”). For additional discussion on these points, see Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2011); Daniel J. Tichenor & Alexandra Filindra, *Raising Arizona v. United States: Historical Patterns of American Immigration Federalism*, 16 LEWIS & CLARK L. REV. 1215 (2012).

<sup>9</sup> See U.S. CITIZENSHIP AND IMMIGRATION SERVICES, INFORMATION ON THE LEGAL RIGHTS AVAILABLE TO IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE IN THE UNITED STATES AND FACTS ABOUT IMMIGRATING ON A MARRIAGE-BASED VISA FACT SHEET, <https://www.uscis.gov/news/fact-sheets/information-legal-rights-available-immigrant-victims-domestic-violence-united->

mented immigrants, have always been particularly vulnerable to threats or social norms in their own communities which discourage asking “outsiders” for assistance or protection. The factors hampering such help may include lack of knowledge or familiarity, shame and threats of violence or isolation from community, concerns about harm to family reputation and privacy, risks of child removal by social services, as well as possible jeopardy to their own or partner’s immigration status.<sup>10</sup> These pressures are compounded by a lack of proficiency speaking English which may create even more barriers (and distress) from giving statements to law enforcement to filing a complaint for protection from abuse or divorce or parental rights.

Some immigrants themselves have (or may be made to believe they have by an abuser) precarious immigration status that may drive even more resistance to becoming visible in the community and/or exercising rights and protections offered by courts and government agencies or even hospitals or schools. This population of victims, therefore, share unique risks of sexual, emotional, economic, and physical assault combined with human trafficking. Immigrants thereby confront a complex array of challenges when even considering accessing the criminal justice and family law systems much less actually accessing those institutions. Under such circumstances, abusers may use immigration status and fear of separation from children and community as a powerful form of abuse to coercively control victims.<sup>11</sup>

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states-and-facts-about-immigrating-marriage-based-visa-fact-sheet (Jan. 11, 2011). It is useful for lawyers working with immigrant populations and domestic violence to review research exploring these experiences. See Nawal H. Ammar, et al., *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 CRIM. JUST. REV. 337 (2012).

<sup>10</sup> See generally Alan J. Dettlaff, Ilze Earner, & Susan D. Phillips, *Latino Children of Immigrants in the Child Welfare System: Prevalence, Characteristics, and Risk*, 31 CHILDREN & YOUTH SERV. REV. 775 (2009); NATIONAL CENTER ON SEXUAL AND DOMESTIC VIOLENCE, available at [www.ncdvs.org](http://www.ncdvs.org) (2018).

Mieko Yoshihama, et al., *Lifecourse Experiences of Intimate Partner Violence and Help-Seeking Among Filipina, Indian and Pakistani Women: Implications for Justice System Responses*, UNITED STATES DEPARTMENT OF JUSTICE DOC. NO. 236174, AWARD NO. 2005-WG-BX-0009 (OCT. 2011).

<sup>11</sup> See generally Carole Angel, et al., *Justice for All: How Attorneys Can Successfully Win Custody Cases for Immigrant Survivors When There Is a Clash of Laws, Cultures, Custody and Parental Rights*, NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT, AMERICAN UNIVERSITY, WASHINGTON COLLEGE

Unfortunately, these problems are compounded within the current political climate when local police and federal immigration law enforcement may be seen through the same lens by immigrants and thereby unintentionally increase the leverage of abusers.<sup>12</sup> Because law enforcement agencies must rely on victims and witnesses for critical, firsthand information to help solve crimes, communities are less safe when immigrants may be too fearful and unable or unwilling to provide eyewitness testimony.<sup>13</sup> With massive global shifts in vulnerable populations due to war, endemic poverty, institutional corruption and government instability, cultural and tribal violence, natural disasters, separately or in combination, increasing, it is critical that judges and lawyers who help these families understand the immigrant experience with American legal and judicial systems. All these sociological, political, and environmental factors suggest that child protection, criminal, juvenile, and family court systems will be assisting and engaging families for many more years to come and with more of these changes internationally on the horizon.

Although precise demographics concerning immigration are subject to discussion depending upon operational definitions and political agency, it is generally accepted that one - fifth of the world's immigrant population live in the United States and, as such, the United States harbors one of the most diverse immigrant populations.<sup>14</sup> Immigrants constitute 17-20% of the total civilian labor force in this country.<sup>15</sup> Additionally, data suggest

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OF LAW (MAY 30, 2014); Elizabeth Hopper & José Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185 (2006); Kevin Shawn Hsu, *Masters and Servants in America: The Ineffectiveness of Current United States Anti-Trafficking Policy in Protecting Victims of Trafficking for the Purposes of Domestic Servitude*, 14 GEO. J. ON POVERTY L. & POL'Y 489 (2007).

<sup>12</sup> See TAHIRIH JUSTICE CENTER, PROMOTING PUBLIC SAFETY BY ENSURING ACCESS TO POLICE PROTECTION FOR IMMIGRANT WOMEN AND GIRLS (2017), available at [www.tahirih.org](http://www.tahirih.org).

<sup>13</sup> *Id.*

<sup>14</sup> See Jeffrey S., Passel & D'Vera Cohn, & Jeffrey Passel, *A Portrait of Unauthorized Immigrants in the United States*, PEW HISPANIC CENTER (2009), <https://bchealthcouncil.wildapricot.org/Resources/Documents/pew-hispanic-2009.pdf>.

<sup>15</sup> See Jynnah Radford, *Key Findings About U.S. Immigrants*, PEW RES. CTR. (2019), reviewed at <https://www.pewresearch.org/fact-tank/2019/06/17/key-findings-about-u-s-immigrants/>.

that approximately 24% of children under the age of 17 live in households with at least one immigrant parent.<sup>16</sup> Demographers have pointedly noted that these data are likely skewed by the manner of counting which modeled male-dominated European households rather than family systems which accounted for women as head of households.<sup>17</sup>

Over the past decade, tens of thousands of children of immigrants have experienced the emotional and psychological impact of deportation of at least one parent. As one author summarized concerning consequences to children: “Between July 2010 and September 2012, 205,000 deportees reported having at least one U.S.-citizen child, amounting to an estimated annual average of approximately 90,000 parental deportations. Moreover, a study conducted by the Immigrant Rights Clinic at the New York University School of Law found that between 2005 and 2010, 87% of processed immigration cases of noncitizens with citizen children resulted in deportation.”<sup>18</sup> There is no reason to currently believe these trends will show any significant reduction as it pertains to children living within these family systems. Given that fear of ar-

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<sup>16</sup> See Candace Evilsizor, Leslye E. Orloff, & Andrea Carcamo Cavazos, *Common Immigration Issues that Arise in Custody Cases Involving Immigrant Crime Victims and Their Children*, NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2014).

<sup>17</sup> See Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 408 (2010) (“Until recently, the study of immigration was largely restricted to studying male immigrants, reflecting a distant past in which heavily-male European and Asian populations immigrated in search of opportunity. For that reason, much of the past demographic research on immigration did not focus on family life.”).

<sup>18</sup> Kalina M. Brabeck, M. Brinton Lykes, & Cristina Hunter, *The Psychosocial Impact of Detention and Deportation on US Migrant Children and Families*, 84 AM. J. ORTHOPSYCHIATRY 496, 497 (2014); Luis H. Zayas, et al., *The Distress of Citizen-Children with Detained and Deported Parents*, 24 J. CHILD AND FAM. STUD. 3213, 3214 (2015) (“Of the estimated 11.7 million undocumented immigrants living in the United States, 52% are from Mexico, placing them at greatest risk for deportation. With estimates showing that for every two adults that are deported, one citizen-child is directly affected over 1 million US citizens may have been subjected directly to the impact of immigration enforcement over the past decade.”); see also AMERICAN IMMIGRATION COUNCIL, U.S. CITIZEN CHILDREN IMPACTED BY IMMIGRATION ENFORCEMENT (Fact Sheet) (2018), available at <https://www.americanimmigrationcouncil.org/research/us-citizen-children-impacted-immigration-enforcement>.



rest and deportation may constrain members of immigrant communities, undocumented or documented, from reporting violence or assault, or seeking financial support for themselves or for the benefit of a child(ren), or seeking the freedom to separate or divorce or to obtain a share of the marital estate or child custody, the implications for judicial systems when such cases enter that portal is significant as a matter of practice and policy.<sup>19</sup>

Ultimately, and as described more specifically below, victimization is often ignored or cast into the shadows. Many immigrants, working and living in this country, have fled war torn countries or communities where they have had minimal access to equal rights or basic freedoms guaranteed in the United States. However, a noncitizen victim's ability to attain the protections depends largely on the victim's ability to access legal assistance and advocacy services from attorneys and advocates knowledgeable about immigrant victims' legal rights.<sup>20</sup> Studies have consistently recognized barriers which may significantly reduce the willingness of immigrant and refugee women who are victims of domestic violence, abuse, or control to seek assistance from advocacy agencies; much less law enforcement.<sup>21</sup> Given current American policies, immigrant communities may be even less

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<sup>19</sup> For a discussion in the context of cultural challenges, see Stewart Chang, *Dreams of My Father, Prisoner for My Mother: The H-4 Nonimmigrant Visa Dilemma and the Need for an Immigration-Status Spousal Support*, 19 UCLA ASIAN PAC. AM. L.J. 1, 2 (2013) ("However, because the dependency created by immigration law is not inconsistent with the traditional values of Asian Indian culture, the problem faced by these women is often masked as a cultural rather than a legal problem. Most of the clients I saw in the clinic specifically emphasized their cultural aversion to divorce rather than potential immigration problems as the primary reasons for wanting the marriage to remain intact. They often focused on factors such as the well-being of the children, financial dependency, and the stigma of divorce in their culture.").

<sup>20</sup> Carole Angel, et al., *Justice for All: How Attorneys Can Successfully Win Custody Cases for Immigrant Survivors When There Is a Clash of Laws, Cultures, Custody and Parental Rights*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW (2014).

<sup>21</sup> See generally Farah Ahmad, et al., *Why Doesn't She Seek Help for Partner Abuse? An Exploratory Study with South Asian Immigrant Women*, 69 SOC. SCI. & MED. 613 (2009); Amanda Burgess-Proctor, *Pathways of Victimization and Resistance: Toward a Feminist Theory of Battered Women's Help-Seeking*, 29 JUST. Q. 309 (2012); Elizabeth Zadnik, Chiara Sabina, & Carlos A. Cuevas, *Violence Against Latinas: The Effects of Undocumented Status on Rates*

likely to report crimes or to seek protection in family courts, which creates a heightened risk of abuse and poor medical and mental health outcomes for adult and child victims.<sup>22</sup>

### III. Gender, Religion, Marriage, and Domestic Violence

For generations, the United States has provided a safety net for parents and children fleeing their countries-of-origin for fear of persecution for political or religious beliefs.<sup>23</sup> Beyond immigration and a desire for safety and freedom for themselves and their children, there are distinct social norms that drive decision making and risk-factors.<sup>24</sup>

#### A. Role of Gender Inequality

Notwithstanding the prevalence of education and services in some of the non-Western immigrant communities, it is important to note that all cultures have some manner of gender inequality.

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*of Victimization and Help-Seeking*, 31 J. INTERPERSONAL VIOLENCE 1141 (2016).

<sup>22</sup> See William W. Harris, Alicia F. Lieberman, & Steven Marans, *In the Best Interests of Society*, 48 J. CHILD PSYCHOL & PSYCHIATRY 392 (2007); Monica N. Modi, Sheallah Palmer & Alicia Armstrong, *The Role of Violence Against Women Act in Addressing Intimate Partner Violence: A Public Health Issue*, 23 J. WOMEN'S HEALTH 253, 256 (2014) ("Immigrant victims of IPV may choose not to tell authorities of their abuse because of fear of deportation or changes in their immigration status if they separate from their abuser.").

<sup>23</sup> See Kenneth Ludlum, *Defining Membership in a Particular Social Group; the Search for a Uniform Approach to Adjudicating Asylum Applications in the United States*, 77 U. PITT. L. REV. 115 (2015).

<sup>24</sup> Although this article focuses on women as victims, this is not intended to ignore the trauma and violence suffered by men or the implications for IPV as a public health issue in terms of interventions and criminal and family court consequences. See Jhumka Gupta, et al., *Premigration Exposure to Political Violence and Perpetration of Intimate Partner Violence Among Immigrant Men in Boston*, 99 AM. J. PUBLIC HEALTH 462, 462 (2009) ("One key experience faced by immigrant men that may add to our understanding of IPV in such communities is exposure to political violence (e.g., state-perpetrated armed conflict, repression, genocide, torture, forced disappearance of family members, and massacre) in their place of origin. Although most immigrants enter the United States for economic reasons, research has demonstrated that, like refugee populations, nonrefugee immigrants experience premigration political violence, with exposure ranging from 11% to 69%.").

It is equally important to acknowledge the deeply embedded presence of this inequality in its economic and political forms within immigrant communities. Studies “in various parts of the world reveal ways in which dominant groups undercut struggles around women’s rights, violence against women and children, and domestic violence. Changes in practices that affect women are often labeled as cultural loss or betrayal. The pre-packaged pictures of cultures can pose serious problems for women’s issues and, by extension, domestic violence.”<sup>25</sup> For example, scholars remind policy makers that there are critical distinctions (and misuse) of the concepts like Sharia in ways that can be biased and harmful:

In Muslim belief, sharia—revealed law, literally “the way”—is the totality of God’s will as revealed to the Prophet Muhammad. *Fiqh*—the science of jurisprudence, literally “understanding”—is the process of human endeavor to discern and extract legal rules from the sacred sources of Islam—that is, the Koran and the Sunna (the practice of the Prophet, as contained in hadith, Traditions). In other words, while the sharia is sacred, universal, and eternal, *Fiqh* is human and—like any other system of jurisprudence—subject to change. *Fiqh* is often mistakenly equated with sharia, both in popular Muslim discourses and by politicians and academic and legal specialists, and often with ideological intent; that is, what Islamists and others assert to be a sharia mandate (hence divine and infallible) is the result of *Fiqh*, juristic speculation and extrapolation (hence human and fallible).<sup>26</sup>

In the Middle East, for example, Islam guides the appropriate standard of behavior for women, the violation of which may subject them to social shame and/or criminal penalties.<sup>27</sup> In these

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<sup>25</sup> Sujata Warrier, *It’s in Their Culture: Fairness and Cultural Considerations in Domestic Violence*, 46 FAM. CT. REV. 537, 537 (2008).

<sup>26</sup> Ziba Mir-Hosseini, *Muslim Women’s Quest for Equality: Between Islamic Law and Feminism*, 32 CRITICAL INQ. 629, 632-33 (2006).

<sup>27</sup> For a discussion of this very complex policy and practice topic, see Anahid Kulwicki, et al., *Barriers in the Utilization of Domestic Violence Services Among Arab Immigrant Women: Perceptions of Professionals, Service Providers & Community Leaders*, 25 J. FAM. VIOLENCE 727 (2010); Shira T. Shapiro, *She Can Do No Wrong: Recent Failures in America’s Immigration Courts to Provide Women Asylum from Honor Crimes Abroad*, 18 AM. U.J. GENDER SOC. POL’Y & L. 293 (2009).

contexts, the law as applied is not codified but is instead a somewhat amorphous and elusive body of principles which may vary in interpretation from country to country and religious person to religious person. In Iran, for example, laws often explicitly favor men; the penal code appears to be much harsher toward women than men, and women have less legal (broadly defined) standing to self-protect or self-advocate. For example, not wearing or inappropriately wearing the hijab (female headscarf), being in the presence of men who are not family or spouse and engaging in extramarital relationships may result in punishments like flogging for Iranian women. The consequences for similar actions by men are either not punishable or less harshly punished.<sup>28</sup>

In a 2009 domestic violence census of 1,140 women and girls in Iraq, single and married, conducted by U.S. State Department and an Iraqi female attorney, sobering data was reported with respect to the frequency or inclination of those questioned as to their likelihood of seeking traditional rule of law remedies in situations of gender-based violence. For example, in a sample size of 738 married Iraqi women, fewer than 5% would go to the police, 20% would go to a doctor or hospital, and slightly less than 10% would go to a court. Nearly 60% would go to a domestic violence shelter if in fact they existed in Iraq (they are not provided or sanctioned by government and the anecdotal data suggest that there are few such privately run in-the-shadows organizations, recipients of foreign donor funds, which may provide some form of protection and shelter). Nearly 60% of the married sample said they wanted a divorce and 20% said that they wanted to go to a religious person to seek remedies from domestic violence. In that same sample of married Iraqi women, when they were asked to self-assess what is domestic violence, and the answers were aggregated among age groups, between 65% and 85% believed it was a crime, and between 50% and nearly 80% considered themselves to have been victims of various forms of domestic violence.<sup>29</sup>

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<sup>28</sup> See Tom Butler, *The Times*; *Are They A-Changin'? Saudi Law Finally Addresses Domestic Violence with Its Regulation on Protection from Abuse*, 100 IOWA L. REV. 1233 (2015) (citing Irshad Abdal-Haqq, *Islamic law: An Overview of Its Origin and Elements*, ISLAMIC L. & CULTURE 27, 39 (2002).

<sup>29</sup> See Suaad Allami & George Phelan, *The United States and Women's Rights in Iraq: Legacy Interrupted*, 97 WOMEN LAW. J. 17 (2012)

When factoring for education as a variable (women with less than high school compared to having a college degree), the data were not significantly different as to what institutional remedies both sets of groups would seek, except that, in one study of 143 women with at least a bachelor's degree, none of the sample would seek help from police if they were victims of domestic violence.<sup>30</sup> Less than 10 % of that college-educated group indicated that they would seek legal remedies including going to court or consulting a divorce lawyer.<sup>31</sup> The most frequent emotional controls cited by these Iraqi women were being made to feel like a servant, being sworn at, being put down, and being blamed for everything. Other physical controls mentioned among all groups were biting, burning, choking, being spied on, being prevented from getting a job, being grabbed, restrained, hair pulling, having objects thrown at them, husbands having the last word, women being blamed for everything, husbands making all the decisions, and husbands demanding to know where the wife was at all times. Specific movement controls mentioned were being prevented from seeing family, not being able to go outside the home alone, and not being allowed to use a telephone.

In Saudi Arabia, for example, family law, the law of inheritance, trusts, and contract law is defined by application of Sharia.<sup>32</sup> Although it is disputed whether Sharia law explicitly condones or condemns domestic violence, "it is undisputed that domestic abuse occurs regularly in Saudi Arabia—although no reliable statistics concerning precise frequency exist."<sup>33</sup> In August 2013, the government of Saudi Arabia passed a "regulation on protection from abuse" which criminalized domestic violence rather than allow judges to rely on their own interpretations of

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<sup>30</sup> *Id.* at 21.

<sup>31</sup> *Id.*

<sup>32</sup> See Hossein Esmacili, *On a Slow Boat towards the Rule of Law: The Nature of Law in the Saudi Arabia Legal System*, 26 ARIZ. J. INT'L & COMP. L. 1, 6 (2009) ("Saudi Arabia's legal system and the role and nature of law in Saudi society are a good example of the interaction between traditional Islam, Saudi tribal structure, and modern law. The Saudi legal and political system is based on three important components: traditional Islam (the Hanbali School of Law and the Wahhabi doctrine), tribal/monarchy structure, and modern institutions. In this section these important aspects of Saudi Arabia's legal system will be analyzed.").

<sup>33</sup> Butler, *supra* note 28, at 1240.

Sharia law in determining whether the allegations constituted a criminal action.”<sup>34</sup> For purposes of immigrant populations, however, gender and religious orthodoxy are deeply mixed. Pointing to Sharia law particularly after 9/11 and the advent of the war on terrorism, may miss connections to other cultural practices as oppressive and supportive of patriarchal policies related to women.<sup>35</sup> As these authors summarized:

Patriarchal religions tend to be governed by rules that initially were formed by and for a male citizenry. As such, these religious systems often demonstrate gender imbalances in leader representation and membership status. As rules are embedded within societal customs that are conceived of as the natural order, it can be difficult to effect change in these systems. For instance, gender norms that prescribe passivity and compliance make it difficult for women to enact resistance.<sup>36</sup>

#### B. *Role of Religion*

As with many Americans, institutional religion and personal and spiritual faith play a profound role in the daily lives of many immigrants and refugees. Religion thereby plays a significant part in the daily lives of the nonwestern immigrant home. Religion itself may define gender roles, rules within marriage, and the context of values and roles.<sup>37</sup> Research suggests that the presence of religion in an immigrant household may cause a victim to interpret domestic violence as linked to individual identity and

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<sup>34</sup> *Id.* at 1245.

<sup>35</sup> This point requires broader sensitivity to culture, law, and gender as well. See Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 *VIOLENCE AGAINST WOMEN* 38, 47 (2005) (“The belief that non-White others are said to engage in oppressive and misogynistic cultural practices fits longstanding biases and serves to downplay the existence of culturally prescribed and equally horrendous acts of violence against women in White Western communities. Domestic violence scholars struggling to achieve a balance.”).

<sup>36</sup> Heidi M. Levitt & Kimberly Ware, “*Anything with Two Heads Is a Monster*” *Religious Leaders’ Perspectives on Marital Equality and Domestic Violence*, 12 *VIOLENCE AGAINST WOMEN* 1169, 1170 (2006).

<sup>37</sup> Charles Hirschman, *The Role of Religion in the Origins and Adaptation of Immigrant Groups in the United States*, 38 *INT’L MIGRATION REV.* 1206, 1211 (2004) (“Religious beliefs and practices can serve as ballast for immigrants as they struggle to adapt to their new homeland.”).

help-seeking behaviors, and create potential obstacles for access to courts or law enforcement.<sup>38</sup> Women may believe that they should endure and accept and/or forgive violence or oppression as a function of religious obligation or duty.<sup>39</sup>

### C. Role of Domestic Violence and Immigration Status

Child welfare agencies and juvenile courts are becoming increasingly involved with immigrant families, particularly as recent immigration enforcement efforts have increased pressures on already vulnerable families and communities.<sup>40</sup> Research and policy literature suggests that hierarchical and patriarchal family structures in immigrant/refugee population groups, where roles may be ascribed primarily by gender and age, may enhance risk factors present with abuse or violence.<sup>41</sup> Strengthening the capacity of agencies to respond to the specific needs of women and children, within these family structures, is critical to reducing isolation and helping encourage safe access services for adults and child victims.<sup>42</sup>

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<sup>38</sup> For example, see the study by Anahid Kulwicki, et al., *Barriers in the Utilization of Domestic Violence services Among Arab Immigrant Women: Perceptions of Professionals, Service Providers & Community Leaders*, 25 J. FAM. VIOLENCE 727, 730 (2010) (“Another complex barrier for women seeking help or leaving is the religious beliefs that predicate family unity and impose strict sanctions against divorce. Moreover, cultural barriers constitute a difficult position for Arab American women where abuse issues are considered to be a private matter that is not to be released to the outside world, in addition to the large stigma that revolves around divorce. For these reasons, women go through tremendous pressure to stay in abusive relationships.”).

<sup>39</sup> This point is not exclusive to immigrants or non-immigrants the United States or other countries. See Betty Jo Barrett, Melissa St. Pierre, & Nadine Vaillancourt, *Police Response to Intimate Partner Violence in Canada: Do Victim Characteristics Matter?*, 21 WOMEN & CRIM. JUST 38 (2011).

<sup>40</sup> See IMMIGRANTS IN THE CHILD WELFARE SYSTEM. AMERICAN BAR ASSOCIATION, CENTER ON CHILDREN AND THE LAW (2018).

<sup>41</sup> For a sample of the literature, see Hermeet K. Kohli & Susan Fineran, “The Rain Grows Plants, the Thunder Does Not”: *Refugee Mothers’ Narratives on Child Abuse and Neglect*, J. IMMIGRANT & REFUGEE STUD. 1 (2019); Cathy Vaughan, et al., *ASPIRE: A Multi-Site Community-Based Participatory Research Project to Increase Understanding of the Dynamics of Violence Against Immigrant and Refugee Women in Australia*, 15 BMC PUBLIC HEALTH 1283 (2015).

<sup>42</sup> See generally Nirmala Prakash, et al., *Improving Health Outcomes for Immigrant Families Through IPV Screening: Resources and Recommendations*

As for whether intimate partner violence (IPV) is more prevalent among foreign born individuals as compared with U.S. born populations, the research is, at best, inconclusive because the variables and accuracy of reporting data is too diffuse or limited at present.<sup>43</sup> IPV in the US is typically conceptualized as violence perpetrated by one intimate partner against the other.<sup>44</sup> It is, therefore, important to account as well for the role of extended family members who may, as a matter of family dynamics, impair or impede reporting or interventions. In immigrant/refugee population groups, there is powerful belief in maintaining privacy from outside forces (from past experience in countries-of-origin not just cultural beliefs), and this “familialism”<sup>45</sup> can hinder escape, reporting of abuse; and accessing outside resources.<sup>46</sup>

#### **IV. Cultural and Social Groups: Explaining the Thing Called Culture**

Beyond language barriers and varied cultural, economic, religious, and educational backgrounds, immigrants have uniquely personal human stories and experiences, including their life and journey from their country to the United States, as well as di-

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for Pediatric Health Care Providers, 49 CURRENT PROBLEMS IN PEDIATRIC AND ADOLESCENT HEALTH CARE 7 (2019); Emily Sellers, *Access to Justice for Undocumented Immigrant Victims of Domestic Violence*, 84 UMKC L. REV. 543 (2015).

<sup>43</sup> See generally Azmaira H. Maker, Priti V. Shah, & Zia Agha, *Child Physical Abuse: Prevalence, Characteristics, Predictors, and Beliefs about Parent-Child Violence in South Asian, Middle Eastern, East Asian, and Latina women in the United States*, 20 J. INTERPERSONAL VIOLENCE 1406 (2005); Emily M. Wright & Michael L. Benson, *Immigration and Intimate Partner Violence: Exploring the Immigrant Paradox*, 57 SOC. PROB. 480 (2010).

<sup>44</sup> See generally Mary E. Gilfus, et al. *Gender and Intimate Partner Violence: Evaluating the Evidence*, 46 J. OF SOC. WORK ED. 245 (2010).

<sup>45</sup> See Alicia Saez-Betacourt, Brian Trung Lam, & Trent Nguyen, *The Meaning of Being Incarcerated on a Domestic Violence Charge and its Impact on Self and Family Among Latino Immigrant Batterers*, 17 J. ETHNIC & CULTURAL DIVERSITY IN SOC. WORK 130 (2008) (discussing familialism).

<sup>46</sup> For a discussion of these concerns and values, see Lola Akin Ojelabi, et al., *A Cultural Assessment of Family Dispute Resolution: Findings About Cultural Appropriateness from the Evaluation of a Family Relationship Centre*, 18 J. FAM. STUD. 76 (2012).



verse experiences with acculturation in a community.<sup>47</sup> This point is especially important because these experiences are not homogenous and cannot be treated as such during policy design or interventions.<sup>48</sup> Within immigrant communities, there are some observed forms of control exercised by its members. These include isolation (limiting a woman's contact with family, phone calls, trips to family and friends from originating country), prohibiting friendships with Americans, impeding learning or speaking English, using immigration and legal status as a ploy to control.<sup>49</sup>

The existence of language barriers compounds the problem of safety for law enforcement and courts, as well as advocacy groups. The U.S. Census Bureau in its American Community Survey estimates that more than 24 million individuals in the United States speak English "less than very well."<sup>50</sup> Institutional actors are well advised to revise and carefully consider examples of what is appropriate terminology when asking questions or doing fact-finding among immigrant women or children. Attorneys working with immigrant victims should have a plan for providing translated documents and should assess the impact of written documents on victims' perceptions of legal rights, health, and safety when determining which documents require translation or editing. This plan should also include a method for identifying interpreters sensitive to the trauma and fears of victims of vio-

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<sup>47</sup> See Jennifer E. Glick, *Connecting Complex Processes: A Decade of Research on Immigrant Families*, 72 J. MARRIAGE AND FAM. 498 (2010).

<sup>48</sup> This point is well-made by one author describing the experience in London of immigrants. See Steven Vertovec, *Super-Diversity and Its Implications*, 30 ETHNIC AND RACIAL STUD. 1024, 1025 (2007) ("By invoking 'super-diversity' I wish, firstly, to underscore the fact that in addition to more people now migrating from more places, significant new conjunctions and interactions of variables have arisen through patterns of immigration to the UK over the past decade; their outcomes surpass the ways in public discourse, policy debates and academic literature that we usually understand diversity in Britain.").

<sup>49</sup> See PATTY BRANCO & SHEETAL RANA, RESPONDING TO THE NEEDS OF IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, NATIONAL RESOURCE CENTER ON DOMESTIC VIOLENCE (2018).

<sup>50</sup> See Carole Angel, et al., *Justice for All: How Attorneys Can Successfully Win Custody Cases for Immigrant Survivors When There Is a Clash of Laws, Cultures, Custody and Parental Rights*, NATIONAL IMMIGRANT WOMEN'S ADVOCACY PROJECT, AMERICAN UNIVERSITY, WASHINGTON COLLEGE OF LAW (2014).

lence and assault so as to address questions and answers in a culturally and gender sensitive manner.<sup>51</sup> This point is important because, as one scholar noted, the effects of insensitive or untrained policy and practice have consequences:

Social science and legal scholarship that focuses on racial identity and racialized structural subordination has analyzed how IPV is experienced by women of color. This scholarship describes the ways in which existing legal and social service responses have fallen short.<sup>52</sup> One common critique is the problematic impact of criminal justice responses to IPV in communities of color.<sup>53</sup> The use of marriage-related immigration laws by abusive U.S. citizen and legal permanent resident husbands to subordinate their immigrant women wives has also been much examined.<sup>52</sup>

The phrase *culturally responsive*, therefore, “means that organizations and agencies are proactively integrating meaningful attention to the cultural identities of participants and staff, to the ways culture can shape people’s experiences trauma and healing.”<sup>53</sup> From a policy perspective this means systematically integrating knowledge of culture(s) into “services, policies, structures, and environments. It requires being interested in, learning about, and acknowledging the vast number of ways people express their cultural identities, values, connections, and experiences in order to provide services that are meaningful and relevant.”<sup>54</sup> Becoming such an organization, whether governmental or non-profit/private agencies, “is a long term, transformative process that takes a thoughtful approach, purposeful planning, and sufficient resources and time.”<sup>55</sup>

Without comprehensive design and implementation of programs, interventions and programs by law enforcement and in family and criminal courts may fail to properly serve the safety needs of victims or the safety of children. First responders and

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<sup>51</sup> *Id.*

<sup>52</sup> Donna H. Lee, *Intimate Partner Violence Against Asian American Women: Moving from Theory to Strategy*, 28 COLUM. J. GENDER & L. 315, 319-20 (2014).

<sup>53</sup> See Carole Warshaw, Erin Tinnon & Cathy Cave, *Tools for Transformation: Becoming Accessible, Culturally Responsive, and Trauma-Informed Organizations*, in NATIONAL CENTER ON DOMESTIC VIOLENCE, TRAUMA & MENTAL HEALTH (2018).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

lawyers, specifically, cannot wait until the day of trial to collect evidence in a fashion which will be admissible in high stakes criminals and family litigation, including preparation for jeopardy and termination of parental rights and domestic violence hearings, motions for temporary orders, settlement negotiations, interviews by guardians ad litem, mediation conferences, and pretrial conferences.<sup>56</sup>

## V. Federal Statutory Protections: Shortcomings and Law Enforcement

What makes domestic violence cases especially fraught for victims is the added uncertainty they face about federal immigration law implications. An offender may be deportable based on the nature and extent of the abusive conduct, the nature of their immigration history, the extent of the abuse, and whether they have engaged in any other criminal conduct. Victims may find themselves eligible for protection but may also, upon entering the system, face inquires as to their own history. In some cases, this general uncertainty about outcomes and the high stakes at issue may impede the desire to seek state or federal assistance, but with time and generational evolution, this knowledge can be useful and offer protections to foreign born and culturally diverse populations.

While there has been progress in the extent to which domestic violence crimes have been addressed generally, it is still not clear whether policies have significantly curtailed continued abuse of this population.<sup>57</sup> Most battered immigrants have no knowledge of their legal rights, including those pertaining to immigration assistance until they seek help for domestic violence from advocates or attorneys such that data suggests, that “89% of battered immigrant women did not know about protection orders until they reached an advocate, attorney, or other service pro-

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<sup>56</sup> For an early approach to improving practices, see Kevin R. Johnson & Amagda Perez, *Clinical Legal Education and the UC Davis Immigration Law Clinic: Putting Theory into Practice and Practice into Theory*, 51 SMU.L. REV. 1423, 1429 (1997) (“Last but not least, the noncitizen clients benefit concretely from the legal representation. Poor immigrants have many, often urgent, needs for legal assistance.”).

<sup>57</sup> Mimi E. Tsankov, *Domestic Violence and the Plight of the Unauthorized Migrant*, FED. LAW. 50 (2014).

vider. Despite this fact, 81% of battered immigrants (including significant numbers of undocumented victims) who sought help from trained advocates and attorneys chose to seek civil protection orders against their abusers.”<sup>58</sup>

In *Commonwealth v. Sealy*<sup>59</sup> for example, the Massachusetts Supreme Judicial Court held that a defendant in a rape trial could impeach his accuser by suggesting to the jury that the victim fabricated the assault charge to gain a U visa. The federal “U” visa program was created by Congress to help crime victims but, some have argued, may paradoxically decrease victim credibility. In fact, this program may allow defense attorneys to attack victims “by suggesting that they are testifying simply to obtain immigration benefits.”<sup>60</sup> As such, the U visa may have uninten-

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<sup>58</sup> Benish Anver & Leslye E. Orloff, *Protection Orders and Battered Immigrants: The Impact of Attorneys and Advocates*, NATIONAL IMMIGRANT WOMEN’S ADVOCACY PROJECT, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW (2014) (citing Nawal H. Ammar, et al., *Battered Immigrant Women in the United States and Protection Orders: An Exploratory Research*, 37 CRIM JUST. REV. 337 (2013)); see also Erica Burman & Khatidja Chantler, *Domestic Violence and Minoritisation: Legal and Policy Barriers Facing Minoritized Women Leaving Violent Relationships*, 28 INT’L J. L. & PSYCHIATRY 59 (2005); Rosa Maria Gonzalez-Guarda, et al., *Hispanic Women’s Experiences with Substance Abuse, Intimate Partner Violence, and Risk for HIV*, 22 J. OF TRANSCULTURAL NURSING 46 (2011); Anahid Kulwicki, et al., *Barriers in the Utilization of Domestic Violence Services Among Arab Immigrant Women: Perceptions of Professionals, Service Providers & Community Leaders*, 25 J. FAM. VIOLENCE 727 (2010); Leslye E. Orloff, et al., *Battered Immigrant Women’s Willingness to Call for Help and Police Response*, 13 UCLA WOMEN’S L.J. 43 (2003); Anita Raj, & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, 8 VIOLENCE AGAINST WOMEN 367 (2002).

<sup>59</sup> 6 N.E.3d 1052 (Mass. 2014).

<sup>60</sup> See Michael Kagan, *Immigrant Victims, Immigrant Accusers*, 48 U. MICH. J.L. REFORM 915, 916 (2014) (“This emerging challenge stems from the U visa program. The U visa program provides up to 10,000 visas per year to otherwise unauthorized immigrants who are victims of certain—mainly violent crimes in the United States.”); see also Eunice Hyunhye Cho, Giselle A. Hass, & Leticia M. Saucedo, *A New Understanding of Substantial Abuse: Evaluating Harm in U Visa Petitions for Immigrant Victims of Workplace Crime*, 29 GEO. IMMIGRATION L.J. 1, 7 (2014) (“In order to qualify for a U visa, an immigrant worker must have been a victim of a qualifying criminal activity, and have information concerning the qualifying criminal activity; been helpful, be helpful, or be likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity; show that the qualifying criminal activity violated a lo-

tionally established a system of trade-offs in which unauthorized immigrants face pressure to testify to certain facts in order to remain in the United States. Even if a victim does not exchange testimony for a U visa, the program may create the perception that immigrants exaggerate crimes to stay in the country. Thus, it is important for family law attorneys working in domestic violence with immigrant populations to understand the role of federal laws as explanations of why a victim may not want to cooperate or may be cooperating in a way that may be inimical to their apparent interest.

## VI. Immigrants, Culture and Child Custody in Family Court

Notwithstanding training sessions for judges, in the end it is imperfect human beings in black robes, not artificial intelligence or computer simulations, who decide these issues, often under serious time constraints and amidst high volume caseloads. There are also multiple layers and intersections with the court and state actors (judges, probation officers, state appointed custody evaluators, child protective workers, police, guardians ad litem ).<sup>61</sup> The need to inform fact finders about cultural insights into a parent's perception and behavior in the context of IPV is coextensive with the benefits of stability and safety.<sup>62</sup> Mixed and re-mixed is the question of whether children exposed to IPV require special protection during any criminal or civil proceedings. As John Hamel has written, model code number 4.01 "from the National Council of Juvenile and Family Court Judges, 'raises a rebuttable pre-

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cal, state, or federal law, or have occurred in the United States or violated a law with extraterritorial reach; and have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity.'").

<sup>61</sup> See Timothy P. Fadgen & Dana E. Prescott, *Do the Best Interests of the Child End at the Nation's Shores? Immigration, State Courts, and Children in the United States*, 28 J. AM. ACAD. MATRIM. LAW. 359 (2016).

<sup>62</sup> The Hague Convention and the International Child Abduction Remedies Act (ICARA) are beyond the scope of this article but do involve complex issues related to accusations and experiences of domestic violence. See Robert D. Arenstein, *How to Prosecute an International Child Abduction Case under the Hague Convention*, 30 J. AM. ACAD. MATRIM. LAW. 1 (2017); Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299 (2013);

sumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator and family violence.’”<sup>63</sup>

What may be derived from research and policy debates is that judicial decision making in custody cases has critical implications for survivors and children’s safety and well-being. Yet, even without the added dimensions of immigration, language barriers, and trauma for parents and children, there is a dearth of empirical research about the factors that may affect decision-making in custody cases with co-occurring domestic violence.<sup>64</sup> From the experience of one of the authors, who is a probate and family court judge in Massachusetts, it is critical for decision makers and professionals to have a clear and research-based understanding of the dynamics of domestic violence, the short- and long-term effects on survivors and children, and risk factors associated with post separation violence. In all judicial arenas, cultural and legal blind spots are unacceptable ethically and in practice when immigration and any of its varied statuses are at risk.<sup>65</sup>

## VII. The Massachusetts Perspective on Immigrants and Domestic Violence

Culture matters when police, court staff, and judges try to determine what is an objectively reasonable fear. The Massachusetts rule of law domestic violence protection scheme is heavily oriented to traditional rule of law institutions such as police,

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<sup>63</sup> John Hamel, *In the Best Interests of Children: What Family Law Attorneys Should Know About Domestic Violence*, 28 J. AM. ACAD. MATRIM. LAW. 427, 427 (2016).

<sup>64</sup> See Lori Sicafuse, *Decision-Making in Custody Cases Involving Domestic Violence: A Review of the Literature*, RESOURCE CENTER ON DOMESTIC VIOLENCE: CHILD PROTECTION AND CUSTODY, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES (2016). For an early study, see Carla C. Kunin, Ebbe B. Ebbesen & Vladimir J. Kone, *An Archival Study of Decision-making in Custody Disputes*, 48 J. CLINICAL PSYCHOL. 564 (1992).

<sup>65</sup> See generally Roni Berger & Ellen Rosenberg, *The Experience of Abused Women with Their Children’s Law Guardians*, 14 VIOLENCE AGAINST WOMEN 71 (2008); Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 UMKC L. REV. 999 (2006); David B. Thronson & Frank P. Sullivan, *Family Courts and Immigration Status*, 63 JUV. & FAM. CT. J. 1 (2012).

courts, lawyers, and victim advocates.<sup>66</sup> There is no case or statute in Massachusetts which specifically invites or instructs trial judges to look into the issue of culture and how it may play in determining whether the complainant's fear is merely subjective or is objectively reasonable as required under the law for a restraining order to issue. There is no system particular to any of the Trial Court departments to capture immigrant status in any case, let alone cases where court protection from violence is sought.

Immigration status is not a factor in access to the Probate and Family Court in Massachusetts. The fifty or so Massachusetts Probate and Family Court Judges do not inquire about immigration status of litigants or witnesses unless an issue has been raised or is apparent that a litigant's immigration status plays a role in the custody, support, parenting time, domestic abuse, coercion, or other issues so often encountered in family court litigation. Inquiries are never made solely to determine whether someone is in the country contrary to federal immigration law. Massachusetts Probate and Family Court promulgated forms (restraining order as well as an order to vacate the home) do not ask for disclosure of the gender of the complainant or immigration status of either party. Guidance has been disseminated to all trial court judges to neither assist nor interfere if and when ICE personnel are in a courthouse in the Commonwealth looking to apprehend someone based on immigration status or other reasons involving criminal charges or convictions.<sup>67</sup>

Culture (in all its layers and adaptations such as language, education, and poverty) matters when police, court staff, and judges try to determine what is objectively reasonable fear for the purpose of issuing and enforcing domestic violence protection orders.<sup>68</sup> Nevertheless, immigration status does not matter if a

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<sup>66</sup> VIOLENCE AGAINST WOMEN ACT STOP GRANT PROGRAM, FFY2017-2020, IMPLEMENTATION PLAN, COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY & SECURITY, OFFICE OF GRANTS & RESEARCH, JUSTICE AND PREVENTION DIVISION (2018).

<sup>67</sup> EXECUTIVE OFFICE OF THE MASSACHUSETTS TRIAL COURT TRANSMITTAL NUMBER 17-13 (NOV. 10, 2017).

<sup>68</sup> Massachusetts is ranked as one of the top ten states with the largest limited English proficiency (LEP) population. In 2013, the federal government launched the Family Court Enhancement Project to help communities and courts to ensure that processes and services "are truly accessible to everyone in

victim needs court-ordered protection. Indeed, Massachusetts Guidelines for Judicial Practice; Abuse Prevention Proceedings, Guideline 5:04 prescribes that the judge examines the totality of the parties' relationship, thus, opening the door to inquiry of more nuanced factors. Other cases have peripherally and inferentially permitted Massachusetts courts to consider other elements normally associated with a violent or controlling relationship (economic dependence, restriction of transportation, or outside contact).<sup>69</sup>

Although the expense of skilled custody evaluators may be out of reach for many, especially self-represented, that lack of financial access is muted by the availability of taxpayer funds to pay for custody evaluators who possess either legal or mental health expertise and have demonstrated that to be placed on a list of those eligible and qualified to receive such appointments.<sup>70</sup> In addition, at least in Norfolk County, Massachusetts, the advent of the "Attorneys Representing Children" (ARC) project, a voluntary and laudable service by the County Bar Association, has been of immense help, representing a source of volunteer unpaid attorneys willing to accept cases to represent children as their voices. The use of mediation and mediators is widespread and has reached increasing popularity at least in Massachusetts where some attorneys and mental health professionals devote substantial or exclusive attention in their practices to mediating disputes outside of normal court systems. In the context of domestic violence where a restraining order has already been issued, the Massachusetts Guidelines for Judicial Practice; Abuse

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the community, including those from under-served communities (e.g., immigrant populations, non—English speaking and limited English proficiency individuals).“ In 2012 the Department of Justice published its language access plan. See U.S. DEPARTMENT OF JUSTICE, [www.justice.gov/sites](http://www.justice.gov/sites).

<sup>69</sup> See *C.R.S. v. J.M.S.*, 92 Mass. App. Ct. 561 (2017); *Schechter v. Schechter*, 88 Mass. App. Ct. 239 (2015).

<sup>70</sup> The ethical use of psychological and custody evaluations requires the evaluator to understand the reliability and validity of testing was normed for the population that is being tested. This is not as understood and respected as it should be among licensed professionals. See American Psychological Association, *Guidelines for Psychological Evaluations in Child Protection Matters*, 68 *AMER. PSYCHOLOGIST* 20 (2013); Benjamin D. Garber & Robert A. Simon, *Individual Adult Psychometric Testing and Child Custody Evaluations: If the Shoe Doesn't Fit, Don't Wear It*, 30 *J. AM. ACAD. MATRIM. LAW.* 325 (2017).



Prevention Proceedings frown upon mediation as a process alien to the principle of protection. However, not all scholars and practitioners subscribe to that theory.

While at the Massachusetts level, training has been provided by in-house trial court judicial colleagues as well as instruction from outside vendors on the non-legal aspects of domestic violence, neither of these trainings have discussed on any significant level the population subgroup of immigrants. The training is mandatory across the Trial Court, by statute.<sup>71</sup> In Massachusetts, there recently was mandatory training for judges on what has been coined as “implicit bias”, recognizing the inherent fallibility of having grown up under different colors, genders, places, statuses, and belief systems.

Massachusetts is among twenty-one states and the District of Columbia where there is a rebuttable presumption that a parent who has committed acts of domestic violence should not have custody, legal or physical. All other states prescribe the effect on the child as a factor when determining the child’s best interest. Twenty-two states make it a “mandatory” factor; one state makes it a discretionary factor.<sup>72</sup> Although bad language or threats about revealing undocumented immigrant status may not warrant a restraining order, these are factors that can be considered by the court not only in a restraining order context but in custody and parenting time orders and may also form cornerstones of objectively reasonable fear. Thus, courts and rule of law personnel charged with determining or protecting victims must ask: should lingering fear of abuse due to the cultural norms practiced locally or in a complainant’s country of origin qualify as objectively rea-

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<sup>71</sup> See COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF THE TRIAL COURT, TRANSMITTAL NUMBER 16-4J (2016). The “New Domestic Violence Training” was developed by the domestic violence education task force with support from the local Judicial Institute and Judiciary Information Services.

<sup>72</sup> See AMERICAN BAR ASSOCIATION COMMISSION ON DOMESTIC & SEXUAL VIOLENCE, JOINT CUSTODY PRESUMPTIONS AND DOMESTIC VIOLENCE EXCEPTIONS (2014); see also Erin Bajackson, *Best Interests of the Child-A Legislative Journey Still in Motion*, 25 J. AM. ACAD. MATRIM. LAW. 311, 334 (2012) (“Therefore, although rebuttable presumption statutes are preferred by many advocates of domestic violence prevention, a state’s adoption of this legislation is no guarantee that a battered woman or child will be able to claim victory inside the courtroom.”).

sonable fear in Massachusetts; should an immigrant plaintiff's behavior inconsistent with fear be judged objectively or culturally in issuing not just restraining orders but divorce custody orders?

Victims from refugee and immigrant populations may underreport domestic violence incidents to law enforcement for a variety of reasons including lack of a relationship between law enforcement and local communities, language barriers, fear of deportation, and experience with law enforcement in their native countries. The lack of data specific to cultural communities hinders the ability to more effectively understand the prevalence rates of domestic violence within these populations.<sup>73</sup> The Violence Against Women Act STOP Grant Program identified the following areas of need related to domestic violence, "sexual assault, dating violence, and stalking in the Commonwealth such as legal counseling and representation, including applications for restraining orders and assistance with family law matters (particularly for refugee and immigrant victims); and linguistic and culturally appropriate services for victims with limited English proficiency."<sup>74</sup> The VAWA funded Domestic Violence Coordinator within the Executive Office of the Trial Court (EOTC) participates in the development and implementation of training court personnel; including judges, court security, interpreters, clerks, attorneys, and other court staff.

### **VIII. Special Protections Afforded to Undocumented Juvenile Immigrants**

Prior to July 26, 2018 legal advocates in the Massachusetts Probate and Family Court seeking special immigrant juvenile visa protection for their clients under the age of 21 relied exclusively on the federal statute. However the Massachusetts legislature passed, as part of its fiscal year 2019 budget, a codification of that visa opportunity in the Massachusetts General Laws, and added to chapter 119 of the general laws a section 39M which describes protections for unmarried persons under the age of 21

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<sup>73</sup> VIOLENCE AGAINST WOMEN ACT STOP GRANT PROGRAM, FFY2017-2020, IMPLEMENTATION PLAN, COMMONWEALTH OF MASSACHUSETTS EXECUTIVE OFFICE OF PUBLIC SAFETY & SECURITY, OFFICE OF GRANTS & RESEARCH, JUSTICE AND PREVENTION DIVISION Feb. 15, 2018).

<sup>74</sup> *Id.*

dependent on the court (probate or juvenile) jurisdiction to make decisions concerning the protection, well-being, care and custody of a child, or to remedy the effects of child abuse, neglect and abandonment or similar circumstances.<sup>75</sup> The court may proceed upon affidavits or other forms of evidence. The court “shall” issue findings of fact regarding abuse, neglect or abandonment or similar circumstances and whether it is viable for the child to be reunited with either or both parents in the country of last and usual residence in the context of the best interest of that child.

The Massachusetts statute specifically permits such petitioners to request abuse protection orders under Massachusetts General Laws ch. 209A. Lastly, the statute seems to confer deferential status as to the timing and expedience of such special juvenile visa hearings, instructing trial courts that they “shall hear, adjudicate and issue findings of fact and rulings of law on any petitioner’s complaint for special findings under this section as soon as it is administratively feasible prior to the child reaching the age of 21 to serve the best interest of the child.” The statute goes even further in its deference: “This section shall be liberally construed to promote the best interest of the child.”<sup>76</sup>

In *Hernandez-Lemus v. Arias-Diaz*,<sup>77</sup> on a special juvenile visa petition, the court pointedly instructed the trial judge who declined to make the special findings based on the trial judge’s assessment as to the ultimate merits of the petition and the motives behind seeking special immigrant status. In that decision, the SJC again gave deference to the timeline “to ensure that the child, who is now approaching his twenty-first birthday, may timely exercise his right to seek SIJ status, the Probate and Family Court shall act forthwith on the motion for special findings.”<sup>78</sup> In *Guardianship of Penate*<sup>79</sup> another special immigrant juvenile visa case, the Supreme Court again took the case directly from the appeals court and weighed in on the trial court for having considered the motives of the petitioner. The Court felt compelled to write that it needed to “clarify the role of the judge with

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<sup>75</sup> See Mass. Gen. L. ch. 119 § 39M;

<sup>76</sup> *Id.*

<sup>77</sup> 480 Mass. 1002 (2018).

<sup>78</sup> *Id.* at 1003.

<sup>79</sup> 477 Mass. 268 (2017).

respect to a juvenile's motion for special findings" that "the judge must make the special findings even if he or she suspects that the immigrant child seeks SIJ status for a reason other than relief from neglect, abuse, or abandonment. The immigrant child's motivation is irrelevant to the judge's special findings."<sup>80</sup> In this case, the Court made this ruling even though it did not dispute the trial judge's finding that the child was in fact in her mother's custody in the state of Massachusetts. The Supreme Court directed the trial judge to make specifically enumerated findings including that it was not in the child's best interest to be returned to another country.

## **IX. Conclusion**

There is an urban legend narrative that notwithstanding research, congressional findings, and state statutes to the contrary, in custody cases domestic violence is not taken seriously by courts and law enforcement, especially when the victim is an immigrant. The suggestion that this is purposeful is contrary to the observations of this co-author judge after nine years on the bench, having heard hundreds if not thousands of restraining order requests (*ex parte*, after notice, extensions, modifications, and terminations) and their variants (domestic relations protective orders, orders to vacate the home, orders to protect the peace). Family court judges nationally must operate within traditional rules of evidence and rely upon lawyers and agencies to help facilitate evidence within the rule of law. Judges focus on the consequences, occasionally lethal, of domestic violence as a factor in any family law custody dispute.

Courts must and do perform a mandatory factual analysis of how abuse of one parent by another has affected the family structure, especially in cases involving immigrants. In this article, the authors describe the experiences of the immigrant community (culturally and personally in transition), including the intersection of those experiences as political winds shift. For practitioners and judges, a deeper understanding of those experiences, often drawn by immigrants from the denial of due process and legal protections denied to them in their countries of origin, requires professionals to consider the factors described in this article.

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<sup>80</sup> *Id.* at 270, 275.